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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LETICIA MARIN BADILLO,

Plaintiff and Appellant,

v.

ABC INDUSTRIES, INC. et al.,

Defendants and Respondents.

B227714

(Los Angeles County  
Super. Ct. No. BC418026)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Rastegar & Matern, Matthew J. Matern, Paul J. Weiner, Sandra Falchetti, Dalia R. Khalili and Joshua N. Lange for Plaintiff and Appellant.

Ballard, Rosenberg, Golper & Savitt, Linda Miller Savitt, John J. Manier and Gordon N. Kojima, for Defendants and Respondents.

## I. INTRODUCTION

Plaintiff, Leticia Marin Badillo, appeals from an August 31, 2010 summary judgment in favor of defendant, ABM Janitorial Services - - Southwest, Inc. Judgment was also entered in favor of a codefendant, ABM Industries Incorporated. Defendant employed plaintiff as a janitorial worker during three separate periods: September 28, 1998 to January 26, 2004; April 18, 2005 to March 27, 2006; and two days in August 2007. Plaintiff contends she was fired in 2004 for exercising her rights under the Family Rights Act. She argues she was fired a second time in 2006 because of her prior exercise of her rights under the Family Rights Act and she rebuffed a male supervisor's sexual advances. Plaintiff admits she did not file her administrative complaint with the Department of Fair Employment and Housing (the department) until August 13, 2008. But plaintiff argues her claims for sexual harassment, retaliation, disability discrimination and violations of the Family Rights Act are not barred by the one-year statute of limitations. She asserts the administrative complaint was timely filed based on equitable tolling and the continuing violation theories. In addition, plaintiff argues she was wrongfully terminated in violation of public policy in August 2007. She asserts the August 2007 discharge was based on her prior assertions of her rights under the Family Rights and the Fair Employment and Housing Acts. Plaintiff also contends the trial court erred in denying her motion to continue the summary judgment motion hearing. Plaintiff's arguments are unpersuasive and we affirm the summary judgment.

## II. BACKGROUND

### A. Complaint

On July 17, 2009, plaintiff filed a complaint against defendant. She also sued four other parties including defendant's parent company, the codefendant, Andrew Bassin (incorrectly sued as Andy Vasis), Wallace Reed and Mike Martinez. Plaintiff alleges

claims for: violation of Government Code<sup>1</sup> section 12945.2 under the Family Rights Act; retaliation in violation of section 12940, subdivisions (h); wrongful termination in violation of public policy; sexual harassment in violation of section 12940, subdivision (j); and disability discrimination in violation of section 12940, subdivision (a). Plaintiff alleges she was employed for eight years as a janitor, assigned to work at the Century Plaza Towers facilities. In 2004 and 2005, plaintiff allegedly took time off to secure medical care for herself and her son. She suffered from severe sinusitis caused by cleaning chemical allergies and cared for her son, who had asthma. Defendants allegedly charged plaintiff with unexcused absences when she took medical leave that was allowed under the federal Family Medical Leave and the Family Rights Acts. Plaintiff alleges defendants improperly relied on her unexcused absences to justify her termination. In addition, plaintiff alleges she was subjected to sexual harassment. Defendants allegedly terminated plaintiff when she complained about the illegal discriminatory and harassing conduct.

#### B. Defendants' Summary Judgment Motion

On May 28, 2010, defendants moved for summary judgment or for summary adjudication. Defendants argued plaintiff's claims under the Family Rights Act and her disability discrimination and sexual harassment claims under the Fair Employment and Housing Act were time-barred. As to plaintiff's third term of employment in August 2007, defendants argued she was terminated because she was ineligible for rehire based on her prior terminations. Defendants argued there was no causal nexus between the purported public policy violations attributed to plaintiff's 2004 and 2006 terminations and defendant's decision to terminate her in 2007. In support of their summary judgment motion, defendants submitted declarations from: Mr. Bassin, defendant's district manager with supervision of Topa Building who later became assistant branch manager

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<sup>1</sup> Unless otherwise noted, all future statutory references are to the Government Code.

in 2003; Mr. Martinez, defendant's project manager of MGM Tower; Lisa Gross, defendant's project manager of Century Plaza Towers; Lenore Espinosa, assistant general counsel for the codefendant, defendant's parent company; excerpts from plaintiff's deposition testimony; and related documents.

The evidence shows defendant first employed plaintiff in September 1998 where she was assigned janitorial duties at the Topa Building. In January 2000, plaintiff requested and was granted a 15-day unpaid leave of absence to care for her son. Plaintiff was provided formal warning of her excessive absenteeism on May 6, 2002, and March 25, October 13 and December 10, 2003. Plaintiff was suspended for three days in December 2003. On January 26, 2004, defendant's district manager, Eliseo Gutierrez, terminated plaintiff's employment for excessive absenteeism with approval from Mr. Bassin. The termination was also approved by defendant's Human Resources Director, William Trejo. Mr. Bassin was not consulted by anyone in 2007 regarding termination of plaintiff's employment and did not know she had been rehired to work at the Century Plaza Towers.

In April 2005, defendant rehired plaintiff a second time and assigned her to work in the MGM Tower. On March 22, 2006, plaintiff was suspended pending Mr. Martinez's investigation of whether she had falsified her sign-in log sheets. On March 27, 2006, Mr. Martinez terminated plaintiff for falsifying her sign-in log sheets with approval from defendant's Human Resource Director, Maria Mendoza. Mr. Martinez was not consulted by anyone in 2007 regarding the decision to terminate plaintiff's employment and was unaware she had been rehired to work at the Century Plaza Towers.

Following her March 2006 termination, plaintiff worked for Able Building Maintenance where she was assigned to the Century Plaza Towers. Defendant secured the contract to clean the Century Plaza Towers on July 29, 2007. Plaintiff submitted an employment application with defendant on July 30, 2007. Plaintiff was rehired by defendant and she worked an 8-hour shift on August 1 and 2, 2007. On August 3, 2007, defendant's Human Resources Director, William Rojas, e-mailed Ms. Gross, defendant's project manager of Century Plaza Towers, that plaintiff was ineligible for rehire.

Plaintiff's ineligibility was due to her prior 2006 termination. Plaintiff's last work day was August 2, 2007. On August 13, 2008, plaintiff filed an administrative complaint with the department against: defendant; the codefendant; American Building Maintenance Company; Mr. Martinez; Andy Vasis; and Mr. Reed. On August 15, 2008, the department issued its case closure and right-to-sue notices.

In opposition, plaintiff argued there were sufficient facts to demonstrate a causal link between the exercise of her rights under the Family Rights Act and her three terminations. In opposition, plaintiff submitted: excerpts of her deposition; portions of Mr. Bassin's deposition; a declaration from Eduardo Avila, a former employee of defendant; and documents related to her employment with defendant. Plaintiff testified she took medical absences during her first term of employment to treat her severe sinusitis and headaches. These illnesses were caused by exposure to harsh cleaning chemicals. She also took leave to administer medication to her son who suffered severe asthma attacks. Plaintiff also stated she provided over 40 doctor's notes to Mr. Gutierrez or her supervisor, Rudy Morales, to show her absences were due to medical issues. However, she did not remember the names of the physicians. Mr. Bassin testified he might have been informed that plaintiff was missing work because of health issues. He did not direct anyone to ask plaintiff why she had been absent so many times and the termination documentation did not contain an explanation for her absences. In addition, plaintiff testified she went to a welcome party in August 2007, during her third term of employment that was attended by Mr. Bassin and Mr. Gutierrez. At the party, Mr. Bassin, with Mr. Gutierrez acting as an interpreter, told plaintiff she could not work at the building unless she provided proof that the absences she took in 2004 were for medical reasons.

Plaintiff contended her claims for retaliation, sexual harassment and Family Rights Act violations are timely because she filed a charge with the department on August 13, 2008. This was less than one year after she was officially terminated on or after August 15, 2007. Plaintiff testified she and two or three union representatives had a meeting with Mr. Bassin. The meeting occurred two or three weeks after August 1, 2007. At the

meeting, Mr. Bassin notified plaintiff and union representatives that plaintiff had already been fired and could not work for defendant. Plaintiff further argued even if she was fired on August 3, 2007, the unlawful termination did not acquire a degree of permanence until the August 15, 2007 meeting with the union representatives and Mr. Bassin. Plaintiff also argued the continuing violation doctrine applied and made her administrative complaint with the department timely because: the three termination decisions were influenced by her past assertion of her right to take medical leave under the Family Rights Act; the unlawful conduct was reasonably frequent because plaintiff was fired about every two years; it was common for facilities to accepting competing bids and change janitorial service providers every two, three or four years; the alleged discriminatory conduct had not acquired a degree of permanence; and this was because there was a risk she would be fired in the future if defendant began providing janitorial services at a location where she was working for another company.

In addition, plaintiff argued the circumstances of her second firing in 2006 were relevant. This was because her third termination was based on her 2006 termination. Plaintiff denied that her second termination in 2006 was based on falsification of her sign-in sheets. Plaintiff testified that if she was late for work, she notified her supervisor, Jorge Ruelas, to let him know she would arrive a few minutes late. When she inquired what arrival time to enter into the sign-in sheets, Mr. Ruelas told her to write down her scheduled start time. During her second employment term, plaintiff testified Mr. Ruelas sexually harassed plaintiff by: regularly talking to her; telling her to take work breaks; asking her out on dates and coffee breaks; telling her she was pretty and asking why she was not with someone; and telling her she would be able to work less if she went out with him. Plaintiff did not report Mr. Ruelas' comments to Mr. Martinez. When Mr. Ruelas learned that plaintiff's coworkers were talking about his inappropriate behavior towards her, he became angry and started complaining about her work. Plaintiff testified soon after Mr. Ruelas's behavior changed, she was investigated for arriving late to work.

Plaintiff submitted a declaration from Mr. Avila, a former employee of defendant. Mr. Avila declared: "My supervisors instructed me to tell the lead supervisors and lead

persons below me at the individual jobsites that the employees should only write down their scheduled work times on the timesheets and not their actual work times. I was told by my supervisors that this was important to save the company money. The employees usually only wrote down their scheduled time on the timesheets. [¶ ] On a regular basis, janitorial employees were required to work beyond their scheduled end times during their shifts in order to complete their cleaning duties for the work day because there [was] too much work that needed to be done.” Plaintiff argued there was a triable issue of fact regarding whether she was fired in contravention of public policy for exercising her rights under the Family Rights Act and or opposing an unlawful employment action by refusing her supervisor’s advances.

### C. Trial Court’s Ruling

On August 25, 2010, defendants’ summary judgment motion was granted. The trial court ruled plaintiff’s first two periods of employment with defendant—September 18, 1998 to January 26, 2004 and April 18, 2005 to March 27, 2006—were time-barred. The trial court reasoned plaintiff did not file her administrative complaint with the department until August 15, 2008, as required by section 12960, subdivision (d). The trial court ruled the continuing violation theory was inapplicable because: defendant’s alleged unlawful actions were distinct and not sufficiently similar in kind; they occurred three times over the course of nine years; and defendant’s actions were permanent because each employment period ended in her termination. Because the continuing violation theory was inapplicable, there was no equitable tolling to allow the causes of action based on unlawful conduct during the first two employment periods to remain valid. Accordingly, the trial court granted summary judgment for: violations of the Family Rights Act during the first two employment periods; sexual harassment; and, violation of section 12940, subdivision (h) which was based upon alleged sexual harassment during the second employment period.

In addition, the trial court granted the summary judgment motion as to plaintiff's claims relating to the August 2007 employment period. The trial court granted summary judgment on plaintiff's claim for violation of section 12945.2 because, "It is undisputed that during this time in August 2007 Plaintiff did not call in sick, request medical leave, communicate the existence of a disability [or] seek any accommodations of a disability in the form of work restrictions." The trial court also granted summary judgment on plaintiff's wrongful termination in violation of public policy claim. The trial court ruled plaintiff failed to establish a causal link between her August 2007 termination and a violation of public policy: "Plaintiff has failed to establish that there is a causal link. The person who made the decision to terminate Plaintiff was William Rojas. Even if Plaintiff's disputed facts about the contact with Defendant Bassin are correct, Plaintiff has failed to properly dispute that William Rojas had any contact with Defendant Bassin or Defendant Martinez before the decision was made or processed. Therefore, because Plaintiff has failed to establish a causal link between Mr. Rojas' decision to terminate her 2007 employment and any alleged violation of public policy, Defendants' motion is granted as to the Third Cause of Action."

On August 31, 2010, judgment was entered against plaintiff. On September 29, 2010, plaintiff filed her notice of appeal.

### III. DISCUSSION

#### A. Standards Of Review

We follow the standard of review stated by our Supreme Court in *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250 in resolving the merits of the summary judgment motion: "Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] "We review the trial court's decision de novo, considering all the evidence set forth in the moving and



opposing papers except that to which objections were made and sustained.” [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.” (Accord *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206; *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) As to the continuance issue, we apply the deferential abuse of discretion standard of review. (*Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270; *Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017, 1023.)

## B. Statute of Limitations Under Fair Employment and Housing Act

The Fair Employment and Housing Act provides employees broad protection against discrimination, harassment, and retaliation on a wide range of impermissible bases. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 106 (*McDonald*); *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72-73.) Section 12945.2 protects employees who need to take family care or medical leave. (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487; *Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 516.) Subject to inapplicable exceptions, an aggrieved employee must file an administrative complaint with the department within one year of the date of the occurrence of the unlawful employment practice. (§ 12960, subd. (d); *McDonald, supra*, 45 Cal.4th at p. 106.) An employee must exhaust this administrative remedy by filing the administrative complaint and securing a notice of right to sue before a civil action may be filed. (§§ 12960, 12965, subd. (b); *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.) As our Supreme Court has explained, “The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under [the Fair Employment and Housing Act].” (*Romano v. Rockwell Internat., Inc., supra*, 14 Cal.4th at p. 492; see *McDonald, supra*, 45 Cal.4th at p. 106.) Where the unlawful employment practice includes improper discharge, the administrative cause of action accrues and statute of limitations run from the actual termination date. (*Romano v.*

*Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at p. 493; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 820.)

Plaintiff acknowledges she filed her administrative complaint with the department on August 13, 2008. But she argues her Family Rights Act, sexual harassment and retaliation claims are not time-barred because of equitable tolling. Our Supreme Court has explained equitable tolling for statute of limitations purposes thusly: “The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. (See *Elkins v. Derby* (1974) 12 Cal.3d 410, 420 & fn. 9; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 650.) It is ‘designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff’s claims—has been satisfied.’ (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 38.) Where applicable, the doctrine will ‘suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.’ (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.)” (*McDonald*, *supra*, 45 Cal.4th at p. 99.) Section 12960, subdivision (d) one-year statute of limitations is equitably tolled while an employee pursues an internal administrative grievance procedure. (*Id.* at p. 108; see *California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1593-1594.)

Citing *McDonald*, plaintiff contends equitable tolling is applicable because she complained to her union about Mr. Bassin’s unlawful decision to fire her and pursued an available internal remedy. But *McDonald* is not pertinent. In *McDonald*, the plaintiff pursued a formal grievance proceeding with the community college chancellor’s office in November 2001 after she was not hired for a database administrator position in January 2001. (*McDonald*, *supra*, 45 Cal.4th at p. 97.) While the formalized internal grievance proceeding was still pending, the plaintiff filed an administrative complaint with the department on October 11, 2002, alleging both race and sex discrimination. (*Id.* at p. 98.) Our Supreme Court held traditional equitable tolling principles applied. Our Supreme Court explained the internal administrative procedures afforded the plaintiff and her employer a full opportunity to formally or informally resolve a dispute in a manner which

will minimize or eliminate entirely the need for judicial proceedings. (*Id.* at p. 105.) The alleged Family Rights Act, sexual harassment and retaliation claims did not arise during plaintiff's third term of employment. Thus, there is no basis for equitable tolling of plaintiff's Family Rights Act claim, which arose during her first term of employment from September 28, 1998 to January 26, 2004. Nor does an equitable tolling theory apply to plaintiff's sexual harassment and retaliation claims, which arose during her second term of employment from April 18, 2005 to March 27, 2006. The one-year statute of limitations is not tolled so as to render the August 13, 2008 filing date of the administrative complaint with the department timely.

Plaintiff also contends her claims are timely under the continuing violation doctrine. In *Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at page 823, our Supreme Court held: "[A]n employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeted at a disabled employee, is a continuing violation if the employer's unlawful actions are (1) sufficiently similar in kind—recognizing, . . . that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms [citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.] . . . '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." The Courts of Appeal have applied the continuing violation doctrine to: sexual harassment; sexual-orientation harassment; and retaliation. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 721, 723-724; *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1004-1006.)

Plaintiff argues the continuing violation doctrine applies because: the decision to terminate plaintiff on three separate occasions was influenced by her past assertion of her right to take medical leave; the unlawful conduct was reasonably frequent in that she was

fired approximately every two years; and there is a real and foreseeable risk that she will be fired in the future if defendant were to begin providing services at a location where she already works. Further, plaintiff contends defendant's conduct has not yet acquired a degree of permanence. We disagree.

The continuing violation doctrine is inapplicable. Defendant's actions were not sufficiently similar in kind and did not involve a course of conduct of harassment, retaliation or failure to accommodate disability which continued into the one-year limitations period. (See *Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 824 [continuing pattern of harassment and failure to accommodate disability before and during limitations period]; *Dominguez v. Washington Mutual Bank*, *supra*, 168 Cal.App.4th at pp. 723-724 [continuing violation where coworker harassed plaintiff in other ways after stopping sexual-orientation themed verbal attacks]; *Birschtein v. New United Motor Manufacturing Inc.*, *supra*, 92 Cal.App.4th at p. 1006 [coworker's staring campaign during limitations period was sufficiently related to overtly sexual remarks that fall outside limitations period].) In addition, the alleged unlawful terminations occurred three times over the course of nine years; thus, the unlawful conduct did not occur with reasonable frequency. Finally, defendant's conduct has acquired a degree of permanence. Each employment period ended in termination, which made clear any further efforts to obtain reasonable accommodation or end harassment are futile. (See *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1059, fn. 19; *Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 823.) Accordingly, we affirm summary judgment on the sexual harassment, retaliation, and Family Rights Act claims.

### C. Wrongful Termination In Violation Of Public Policy Claim

A wrongful termination in violation of public policy claim is based on the assertion that the employer's motives for terminating the employee are so contrary to fundamental norms an injury sounding in tort occurred. (See *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 702; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176.)

An employee may recover in tort for wrongful termination if the discharge violated an established public policy. (*Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104; *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256.) Our Supreme Court has explained: “To support a claim for wrongful termination in violation of public policy, a policy must be ‘delineated in either constitutional or statutory provisions’; it must be ““public” in the sense that it “inures to the benefit of the public” rather than serving merely the interests of the individual’; it must have been well established ‘at the time of the discharge’; and it must be ‘fundamental’ and ‘substantial.’ [Citation.]” (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 942; accord *Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1112.) The statute of limitations for a claim of wrongful termination in violation of public policy is governed by the two-year statute of limitations for personal injury claims. (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1208-1209; Code Civ. Proc. § 335.1.) A wrongful termination in violation of public policy claim accrues at the time of discharge. (*Romano v. Rockwell Internat. Inc.*, *supra*, 14 Cal.4th at p. 501; Rylaarsdam, Civil Practice Guide: Civil Procedure Before Trial, Statute of Limitations (The Rutter Group 2011) ¶ 4:312, p. 4-26 (rev. #1, 2011).)

Plaintiff argues: she was wrongfully terminated in violation of the Fair Employment and Housing Act and the Family Rights Act; defendants have opened the door to examining the circumstances surrounding the March 2006 firing in relying on it to justify the August 2007 termination; and defendant’s purported legitimate, non-discriminatory reason for firing her in March 2006 is pre-textual. Plaintiff reasons defendant had a policy of directing janitorial employees to write down their scheduled time on the sign-in sheets and not their actual work periods. This she contends was because defendant could avoid paying overtime. Plaintiff cites Mr. Avila’s declaration. Mr. Avila stated that as defendant’s district supervisor, he was instructed to tell building supervisors that janitorial employees should only write down their scheduled work times on timesheets. According to Mr. Avila, this was done so defendant would not have to pay overtime.

However, it is undisputed that in August 2007, plaintiff did not call in sick or request medical leave. Thus, plaintiff's claim for wrongful termination in violation of her Family Rights Act accrued at the time of her January 2004 discharge and is barred by the two-year statute of limitations. The same is true of her sexual harassment and retaliation claims. They accrued at the time of her March 2006 discharge and are barred by the two-year statute of limitations. Finally, there is no causal connection between plaintiff's August 2007 termination and any activity protected under the Family Rights or Fair Employment and Housing Acts. It is undisputed Mr. Rojas made the decision to terminate plaintiff in August 2007. Mr. Rojas made the termination decision without any input from Mr. Bassin who participated in the decision to discharge plaintiff in January 2004. Nor did Mr. Rojas act after consulting Mr. Martinez, who participated in the decision to terminate plaintiff in March 2006.

#### D. Continuance Issue

Plaintiff contends the summary judgment motion should have been denied or the hearing continued pursuant to Code of Civil Procedure section 437c, subdivision (h). As noted, we review this contention for an abuse of discretion. (*Combs v. Skyriver Communications, Inc.*, *supra*, 159 Cal.App.4th at p. 1270; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100.) In granting defendants' summary judgment motion, the trial court implicitly denied plaintiff's continuance request. (See *Combs v. Skyriver Communications, Inc.*, *supra*, 159 Cal.App.4th at p. 1270.) The trial court did not abuse its discretion because plaintiff failed to file a supporting declaration stating facts essential to justify opposition may exist which could not then be presented. (Code Civ. Proc., § 437c, subd. (h); *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

#### IV. DISPOSITION

The judgment is affirmed. Defendants, ABM Industries Incorporated, ABM Janitorial Services -- Southwest Inc., are to recover their costs on appeal from plaintiff, Leticia Marin Badillo.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.